BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE FILING BY SUPERIOR RENEWABLE ENERGY LLC, ET AL, AGAINST MONTANA-DAKOTA UTILITIES CO. REGARDING THE JAVA WIND PROJECT

Docket No. EL04-016

Superior's Supplemental Memorandum in Support of Motion for Reconsideration

On October 7, 2005, Superior Renewable Energy LLC (Superior) on behalf of itself and its subsidiary, Java LLC, filed a Motion for Reconsideration of the Commission's October 4, 2005 decision granting a motion by Montana-Dakota Utilities Company (MDU) to defer the hearing that was scheduled for November 3-4, 2005 in this proceeding. Superior is filing this Supplemental Memorandum in support of that motion to clarify the procedural aspects of this proceeding and to provide guidance to the Commission on outstanding issues.

In addition, Superior is submitting a copy of a decision issued by the Federal Energy Regulatory Commission (FERC) on October 11, 2005, dismissing Alliant Energy Corporate Service, Inc.'s (Alliant's) petition for declaratory order regarding Alliant's mandatory purchase obligation under the newly enacted Section 210(m)(3) of the Public Utilities Regulatory Policies Act (PURPA).[1] (See Attachment 1). Superior requests that the Commission (1) reinstate the November 3-4, 2005 hearing date (or establish the next available date for the hearing) and (2) rule that MDU has an existing obligation to Superior and is thus subject to the mandatory purchase obligation with respect to Superior.

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[1] 16 U.S.C. § 824a-3(m). New Section 210(m) was enacted as part of the Energy Policy Act of 2005 (2005 Act), which was signed into law by the President on August 8, 2005.

PROCEDURAL BACKGROUND

After the scheduling of the November 3-4, 2005 hearing date, the procedural history of this proceeding is as follows:

- On September 16, 2005, MDU filed a Motion for Deferral of the hearing. MDU requested that the Commission defer this proceeding until after FERC decided Alliant's petition for declaratory order. MDU also requested that the Commission defer this proceeding until after FERC decided a similar application that was, at that time, yet-to-be filed by MDU.

- On September 22, 2005, MDU filed an application at FERC regarding MDU's obligation to purchase the output of Superior under the newly enacted Section 210(m)(3) of PURPA. (FERC has since issued a Notice of Filing of MDU's application and set an intervention/comment deadline of October 24, 2005).

- On September 27, 2005, Superior filed a response objecting to MDU's motion to defer the hearing. Superior also requested affirmative relief in two forms: (1) that the Commission enter an order finding that MDU has an existing obligation and/or contract pending approval under PURPA and is thus subject to PURPA's mandatory purchase obligation[2] as its relates to Superior; and (2) that the Commission issue an order to show cause why MDU is not in violation of its PURPA obligation by engaging in intentional delays of this proceeding to avoid its PURPA obligations.

- On September 29, 2005, Superior filed a Motion to Lodge the Decision of the Iowa Utility Board denying a similar motion to defer pending avoided cost proceedings in the Alliant service territories.

- On September 30, 2005, Superior submitted an Affidavit of Jeff Ferguson detailing Superior's expenditures to date in connection with the Java Project.

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[2] Although the new Section 210(m)(1) of PURPA permits FERC to terminate PURPA's mandatory purchase obligation under certain circumstances on a case-by-case basis, Section 210(m)(6) contains a "savings clause" that protects pre-existing rights granted under PURPA. That section states that nothing in subsection 210(m) affects the "rights or remedies of any party under ***any contract or obligation, in effect or pending approval before the appropriate State regulatory authority***...on the date of enactment..." (emphasis added).

- On October 3, 2005, MDU filed a reply to Superior's September 27, 2005 response, arguing, among other things, that the Commission is not specifically empowered by the South Dakota Legislature to enforce the provisions of PURPA beyond the limited grant of authority to determine avoided costs delegated to it by PURPA. In that reply, MDU did not raise any fact issues with respect to any aspects of the affirmative relief sought by Superior.

- At its regularly scheduled meeting on October 4, 2005, the Commission granted MDU's motion to defer the hearing until after FERC makes its ruling in the Alliant Energy proceeding. (A written order was issued on October 5, 2005.)

- On October 7, 2005, Superior filed a Motion for Reconsideration of the October 4 ruling included legal arguments in support of Superior's claim that the Commission has jurisdiction to decide whether MDU has an existing obligation as stated in Section 210(m). Superior requested that the Commission reinstate the November 3-4 hearing date.

- On October 11, 2005, FERC dismissed Alliant's petition for declaratory order, without prejudice to refiling, because Alliant did not provide the statutorily required "sufficient notice" to all potentially affected Qualifying Facilities (QFs). A copy of FERC's October 11 order is attached.

DISCUSSION

I. The Commission Should Decide the Issue of Whether MDU Has an Existing Obligation and/or Contract Pending Approval Under PURPA.

In its September 27, 2005 response to MDU's deferral motion, Superior requested that the Commission issue an order finding that MDU has an existing obligation and/or contract pending approval under PURPA and thus is subject to PURPA's mandatory purchase obligation with respect to Superior. In the October 4 order, the Commission granted MDU's motion to defer, but it did not rule on Superior's existing obligation question. Superior requests that, in addition to reinstating the hearing date, the Commission issue an order addressing the existing obligation issue.

As discussed in Superior's September 27, 2005 filing, the Supreme Court has resolved the question of whether state agencies have the jurisdiction under Section 210 of

PURPA and, consequently, the responsibility to implement the standards established by the PURPA federal statutory scheme.[3]

Determining whether or not MDU has an existing obligation under PURPA does not require a factual determination. The only relevant facts for this determination are undisputed, and are essentially of a procedural nature, namely that Superior's subsidiary, Java LLC, filed the necessary documents at FERC for the Java Wind Project to become a QF on April 15, 2004 and that Superior filed a complaint seeking an avoided cost rate determination and power purchase agreement on May 12, 2004.[4] Following the FERC's decision in *Metropolitan Edison Co.*, 72 FERC ¶ 61,269, at 62,184 (1995), these undisputed facts establish that Superior had a "contract or obligation, in effect or pending approval..." prior to the August 8, 2005 date referenced in the Section 210(m) addition to PURPA. For this reason, any ruling made by the FERC exempting MDU from its PURPA obligations for "new" contracts or obligations should not apply to the Java Wind Project.[5]

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[3] See Superior's September 27, 2005 Motion for Reconsideration at 4-5, discussing *FERC v. Mississippi*, 456 U.S. 742 (1982) (reversing an appellate court holding that PURPA Section 210 impermissibly intruded on state jurisdiction).

[4] On August 25, 2004, Java re-certified the Java Wind Project to increase the number of turbines from 17 1.5 MW turbines to 21 1.5 MW turbines. This procedural fact is also not disputed by MDU. Because the recertification occurred prior to August 8, 2005, it has no impact on the question of whether or not MDU is exempt from its PURPA obligations with respect to the re-certified QF.

[5] See Superior's Request for Affirmative Relief at pp. 4-8, discussing how the amendments to PURPA apply only to "new" contracts and to contracts and obligations in effect or pending approval prior to August 8, 2005.

There is no need to wait until the hearing to decide this issue. Indeed, no testimony has been filed on this issue, nor does there need to be. The relevant facts are not in dispute. Thus, based on the law as described in Superior's September 27 motion, the Commission should find that MDU has an existing obligation and/or contract pending approval under PURPA prior to the effective date of Section 210(m) of PURPA.

A decision by the Commission now rather than at some later time is important for two reasons. First, the FERC should have before it the benefit of the Commission's wisdom on this issue prior to deciding how it will rule with respect to MDU's request for an exemption. Having delegated to each state responsibility for implementing PURPA in their state and for determining how and when obligations arise under PURPA in their state, the FERC will likely be very interested in seeing how this Commission views Superior's rights and MDU's obligations with respect to the Java Wind Project under South Dakota's implementation of PURPA before ruling itself on whether or not MDU is entitled to any of the relief that MDU is requesting.

Second, the time period in which the PURPA mandatory purchase obligation arises is highly relevant to the avoided cost determination that Superior has sought in this proceeding. Both Superior and MDU have filed testimony with respect to avoided cost that is consistent with *Metropolitan Edison*'s holding with respect to the time period to be used for determining MDU's avoided costs. Both parties submitted testimony that analyzes MDU's avoided costs using the time period that *Metropolitan Edison* says matters, namely when Java became a Qualified Facility and first attempted to obtain a PPA with MDU. If the time period is different, then the parties may need to supplement their testimony to account for

any changes in MDU's avoided cost that arise from this change.[6] A decision from the Commission now will give the parties the necessary guidance to determine whether or how their testimony should be supplemented.

II. The Hearing Should Not Be Delayed.

The October 4 ruling stated that the hearing in this proceeding would be deferred until after FERC decides the petition filed by Alliant Energy. At the time the order was issued, a decision in the Alliant Energy proceeding was expected on or about November 10, 2995. Since that time, FERC dismissed the Alliant Energy petition, without prejudice, for Alliant to refile with sufficient information regarding the existing QFs in its service territories so that those QFs would have "sufficient notice" of the filing as required in Section 210(m)(3). As of the filing of this pleading, Alliant Energy has not refiled its petition. Thus, the 90 day decision period under Section 210(m)(3) has not yet begun to run. Delaying the hearing until the Alliant Petition is decided is thus not an appropriate time frame for delaying this hearing.

In addition, MDU's application at FERC does not include the information regarding existing QFs that FERC found lacking in Alliant's petition. Therefore, it is likely that FERC will dismiss MDU's petition as well. In that event, the 90-day decision period for MDU's application will also be restarted.

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[6] Superior believes that some testimony at the hearing to show how MDU's avoided costs have changed as a consequence of MDU's delays in reaching a PPA with Superior is necessary and appropriate in any event.

In Order F-3365, the Commission undertook "*to resolve any contract disputes that arose between the parties.*"[7] The Commission should not allow further delay in this proceeding. Waiting for final decisions in the FERC dockets could take years. Moreover, those decisions would not be dispositive of the issues in this proceeding. See Superior's September 27th Response. Given that the Commission has broad jurisdiction over this matter, and further delays will be harmful to Superior, the Commission should reinstate the November 3-4, 2005 hearing date. If those dates are no longer available, Superior requests the next earliest available hearing date be scheduled. (Superior understands that December 12-16, 2005 may be available for the hearing.)

[7] *In the Matter of the Investigation of the Implementation of Certain Requirements of Title II of the Public Utilities Regulatory Policy Act of 1978 Regarding Cogeneration and Small Power Production,* Decision and Order F-3365 (December 14, 1982) (Order F-3365).

CONCLUSION

Superior requests that the Commission reinstate the November 3-4 hearing date or the earliest available hearing date thereafter.

Respectfully submitted,

/s/

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113 FERC ¶ 61,024
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Alliant Energy Corporate Services, Inc. Docket No. EL05-143-000

ORDER DISMISSING PETITION FOR DECLARATORY ORDER

(Issued October 11, 2005)

1. On August 12, 2005, Alliant Energy Corporate Services, Inc. (Alliant), on behalf of Interstate Power and Light Company (IPL) and Wisconsin Power and Light Company (WPL), (collectively, Applicants) filed a petition for declaratory order requesting that IPL and WPL not be required to enter into a new contract or obligation to purchase electric energy from a qualifying facility (QF), pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA).[1] As discussed below, this order dismisses, without prejudice to refiling, Applicants' petition for declaratory order.

Background

Statutory Background

2. EPAct 2005, enacted on August 8, 2005, amended section 210 of PURPA[2] by providing for termination of the so-called mandatory purchase obligation upon a Commission finding that a QF has nondiscriminatory access to wholesale markets, as more fully defined in EPAct 2005.

3. More specifically, section 210(m)(1) of PURPA provides that no electric utility shall be required to purchase electric energy from a QF if the Commission finds that the QF has nondiscriminatory access to:

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[1] 16 U.S.C. § 824a-3(m). Section 210(m) was added to PURPA by section 1253(a) of the Energy Policy Act of 2005 (EPAct 2005), Pub. L. No. 109-58, § 1253 (a), 119 Stat. 594 (2005).

[2] 16 U.S.C. § 824a-3 (2000).

(A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or

(B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

Factual Background

4. Alliant represents that it is a services company subsidiary of Alliant Energy Corporation, the parent corporation of both IPL and WPL. IPL's service territory covers most of eastern and central Iowa, and small sections of southern Minnesota and western Illinois; IPL is a transmission-owning member of Midwest Independent System Operator, Inc. (Midwest ISO). WPL's service territory encompasses eastern and central Wisconsin. WPL transferred its transmission system to American Transmission Company LLC, which is also a transmission-owning member of Midwest ISO.

5. Alliant explains that both IPL and WPL have power purchase contracts with several existing QFs. Through competitive bid solicitations, both utilities have also voluntarily entered into power purchase agreements with developers of generating facilities that will presumably be QFs once constructed and placed into service. IPL and WPL have also received demands from Midwest Renewable Energy Project, LLC (Midwest Renewable), a developer of small power production facilities, to purchase the output of its future projects when constructed and placed into service.[3]

6. Alliant states that by virtue of IPL and WPL being within the Midwest ISO, there are day-ahead and real-time wholesale markets available to QFs within this region.

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[3] Applicants state that Midwest Renewable has commenced regulatory proceedings before the Iowa Utilities Board and the Public Service Commission of Wisconsin seeking determinations of IPL's and WPL's avoided costs in order to establish QF purchase prices (state avoided cost proceedings).

Alliant also contends that QFs within the territory have access to generator interconnection service, as well as open access transmission service offered by Midwest ISO, and other transmission providers, under open access transmission tariffs. Alliant argues that the Midwest ISO market satisfies the competitive markets prerequisite for a Commission finding that IPL and WPL qualify for exemption from the mandatory purchase obligation.

7. Alliant also requests that the Commission find that the exemption applies to any project that is currently not built and not in operation. This determination would affect any arrangements between IPL and WPL and Midwest Renewable, the developer of QFs that has sought state regulatory determinations of IPL's and WPL's avoided costs for its planned QF projects.

Notices, Interventions and Protests

8. Notice of Applicants' petition for declaratory order was published in the *Federal Register*, 70 Fed. Reg. 50,305 (2005), with protests, and interventions due on or before September 12, 2005.

9. Edison Electric Institute filed to intervene and comment in support of Alliant's petition. Other parties filed timely interventions and protests opposing Alliant's petition: Electric Power Supply Association; American Forest and Paper Association; Superior Renewable Energy, LLC; Gregory Swecker, Beverly Swecker, and Welch Motels, Inc.; the Cogeneration Association of California; the American Wind Energy Association; American Chemistry Council; Occidental Chemical Corporation; Granite State Hydropower Association; Midwest Renewable; jointly, American Forest and Paper Association, the American Iron and Steel Institute, the American Wind Energy Association, the Council of Industrial Boiler Operators, the Electricity Consumers Resource Council, the Electric Power Supply Association, the Environmental Law and Policy Center, the Fertilizer Institute, G. McNeilus Wind Energy Company, the National Petrochemical and Refiners Association, the Minnesota Project, the Ohio Consumers' Council, and Project for Sustainable FERC Energy Policy; California Cogeneration Council; Industrial Energy Users-Ohio; and jointly, Electricity Consumers Resource Council, the American Iron and Steel Institute, the American Chemistry Council, the Association of Businesses Advocating Tariff Equity, and the Wisconsin Industrial Energy Group.

10. The Iowa Renewable Energy Association, the Coalition of Midwest Transmission Customers, Calpine and jointly Iowa Renewable Energy Association and the Iowa Farmers Union filed untimely protests.

11. Several parties filed timely motions to intervene: ConocoPhilips Company, American Electric Power Company, Montana-Dakota Utilities Co., Environmental Law

& Policy Center, Calpine, Madison Gas and Electric Company, and The Detroit Edison Company. The Public Service Commission of Wisconsin filed a notice of intervention. Exelon Corporation filed an untimely motion to intervene. The Coalition of Midwest Transmission Customers, the Office of the Ohio Consumers' Council and Dr. Blair Henry filed untimely motions to intervene and protests.

12. Midwest Renewable argues that section 210(m)(6) of PURPA expressly preserves the existing rights and remedies of any entity that has QF-related requests pending before state regulatory authorities on the date of enactment of EPAct 2005.[4] On that date, Midwest Renewable had avoided cost proceedings pending before the Iowa Utilities Board and the Public Service Commission of Wisconsin. Midwest Renewable argues that section 210(m)(6) applies to its projects, even though they are not built or not in operation at the date of enactment.

13. The other parties that oppose Alliant's petition believe that Alliant fails to address the criteria of section 210(m)(1) of PURPA, including the statutory requirements that QFs have access to long-term energy and capacity markets. Opposing parties assert that Alliant has not met its statutory burden by providing specific evidence that IPL and WPL operate in a competitive market where QFs have nondiscriminatory access and a meaningful opportunity to sell their output on a long-term basis.

14. Alliant filed an answer to the various motions to intervene, protests and comments.

Discussion

Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Further, we will grant the untimely motions to intervene given their interests, the early stage of this proceeding, and the absence of undue prejudice or delay.

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[4] Section 210(m)(6) states:

> Nothing in this subsection affects the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on the date of enactment of this sub-section, to purchase electric energy or capacity from or to sell electric energy or capacity to a qualifying cogeneration facility or qualifying small power production facility under this Act (including the right to recover costs of purchasing electric energy or capacity).

Commission Determination

16. Applicants' petition for declaratory order is the first application received by the Commission since the enactment of EPAct 2005 seeking termination of the mandatory purchase obligation.

17. Section 210(m)(3) of PURPA requires, among other things, that "sufficient notice" be given to "potentially affected" QFs and establishes a time frame for Commission action.

18. As a preliminary matter, section 210(m)(3) states:

> any electric utility may file an application with the Commission for relief from the mandatory purchase obligation . . . on a service territory-wide basis. Such application shall set forth the factual basis upon which relief is requested . . . . After notice, including sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application . . . .

19. In order to meet the express statutory requirement of "notice", including "sufficient notice to potentially affected . . . . .production facilities", the Commission will require that applicants identify all potentially affected QFs.

20. In the instant case, while notice of Alliant's application was published in the *Federal Register*, it does not appear from the filing that the statutorily-required "sufficient notice" was provided to the QFs that are potentially affected by Alliant's application. Before the Commission will consider this (or any similar) application, Alliant or any similar applicants will be required to identify to the Commission potentially affected QFs (including their names and current addresses) – including: (1) those QFs that have existing power purchase contracts with IPL and WPL; (2) other QFs that sell their output to IPL and WPL or that have pending requests for IPL and WPL to purchase their output; (3) any developer of generating facilities with whom IPL and WPL have agreed to enter into power purchase contracts or are in discussion with regard to power purchase contacts; (4) the developers of facilities that have pending state avoided cost proceedings; and (5) any other QFs that Alliant reasonably believes to be affected by its petition. Because the statute requires notice of an application for termination of the mandatory purchase obligation to be provided to all potentially affected QFs, and we are not able to do so here until the applicants provide the foregoing information, we will dismiss, without prejudice, Applicants' instant petition for declaratory order.

The Commission orders:

Alliant's petition is hereby dismissed without prejudice.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.